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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS.

Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' OPPOSITION TO
ADMINISTRATIVE MOTION**

I. INTRODUCTION

The Supreme Court requires district courts to act as “gatekeepers” to ensure that only reliable and relevant expert testimony is admitted. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993). Defendants’ Motion to Strike the Report of Dr. Edward E. Leamer (“*Daubert* motion”) argues that Leamer’s testimony - offered to support certification of a class of tens of thousands - is unreliable and irrelevant.¹ (Dkt. 210) Plaintiffs’ argument that the *Daubert* motion is improper is unfounded. To the contrary, as noted in Defendants’ Request for an Evidentiary Hearing (Dkt. 213), courts in this Circuit and others have regularly followed guidance in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011), to resolve *Daubert* motions at the class certification stage. *See, e.g., Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983-84 (9th Cir. 2011) (Costco “filed three separate motions to strike Plaintiffs’ experts” under *Daubert*); *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (“Honda moved to strike the report [of plaintiffs’ class certification expert] pursuant to *Daubert*”); *Tietsworth v. Sears, Roebuck & Co.*, 5:09-CV-00288-JF, 2012 U.S. Dist. LEXIS 62956, *21 n. 5 (N.D. Cal.) (*Ellis* requires *Daubert* analysis at class certification stage). Where, as here, a *Daubert* analysis is required, a court “has no discretion to avoid performing” one, or to do so on a truncated record. *See Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223, 1228-29 (10th Cir. 2003) (pre-trial); *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 812-13, 826 (7th Cir. 2012) (“When an expert’s report or testimony is ‘critical to class certification,’” reversible error to decide certification without ruling on *Daubert* motion); *Ellis*, 657 F.3d at 982 (requiring full *Daubert* analysis on class certification).

II. ARGUMENT

A. A *Daubert* Motion Is The Well-Accepted Way To Challenge the Admissibility of an Expert’s Opinions On Class Certification In Antitrust Cases

¹ Plaintiffs’ description of the *Daubert* motion is inaccurate. It does not “simply summarize[] at length various criticisms offered by [Defendants’] expert, Dr. Murphy.” It relies mostly on Leamer’s admissions at deposition of his lack of knowledge of any market facts that support his opinions (Motion, Argument A), his own published criticisms of the unsound statistical methodologies he used here (Argument B), and his concessions that his analyses are highly subjective and cannot support his opinions in any event. (Argument C).

1 A *Daubert* motion is the standard, well-accepted way to challenge the admissibility of
 2 expert testimony in antitrust cases, whether on class certification or otherwise, in this District and
 3 elsewhere, and before and after the 2010 change to Local Rule 7-3. *See, e.g., Ralston v. Mortgage*
 4 *Investors Group*, No. 5:08-CV-00536-JF, 2011 U.S. Dist. LEXIS 138149, *3 (N.D. Cal.) (granting
 5 “independent motions to exclude expert testimony and reports” relating to class certification under
 6 *Daubert*); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-MD-01827-SI, 2012 U.S. Dist.
 7 LEXIS 21696, *53 (N.D. Cal.) (ruling on *Daubert* motion related to class decertification motion);
 8 *Perez v. State Farm Mut. Auto. Ins. Co.*, No. 5:06-CV-01962-JW, 2011 U.S. Dist. LEXIS 155921,
 9 *4 (N.D. Cal.) (same). Defendants are aware of no case applying Local Rule 7-3(a)’s requirement
 10 that “any evidentiary and procedural objections to [a] motion must be contained within the brief or
 11 memorandum” to bar a *Daubert* motion under the present circumstances.

12 In *Apple v. Samsung*, this Court denied without prejudice a *Daubert* motion under Rule
 13 7-3(a) at the preliminary injunction stage. In that case, “[w]ith leave of the Court, Samsung filed
 14 a 40-page opposition memorandum that included none of the evidentiary objections presented in
 15 Samsung’s separate [24-page] motion to exclude.” *Apple Inc. v. Samsung Electronics Co., Ltd.*,
 16 No. 5:11-CV-1846-LHK, 2011 U.S. Dist. LEXIS 139049, *11-12 (N.D. Cal.). Defendants
 17 believe the circumstances here are different in important ways. First, Ninth Circuit law requires
 18 resolution of *Daubert* challenges at the class certification stage. *See Ellis*, 657 F.3d at 982. By
 19 comparison, in denying Samsung’s *Daubert* motion, the Court expressly noted that it had
 20 “discretion to consider evidence even if it would be inadmissible at trial” in ruling on a
 21 preliminary injunction motion, and therefore “would have had other grounds to deny Samsung’s
 22 objection to the [expert’s] testimony” regardless of Rule 7-3. Second, Defendants’ 25-page
 23 opposition brief was not already the subject of a page extension and it does include evidentiary
 24 objections to Leamer’s testimony. (Dkt. 209, at 3, 23) Defendants acknowledge that the better
 25 course would have been to seek the Court’s approval in advance. But they had no intent to act
 26 contrary to the Rule’s letter or spirit or to this Court’s rulings. *See also Villa v. United Site*
 27 *Servs. of Cal., Inc.*, 5:12-CV-00318-LHK, 2012 U.S. Dist. LEXIS 162922, *2, n.1, 46 (N.D.
 28 Cal.) (declining to consider separately filed objections to declarations but ruling on separate

1 motion to strike); *Abaxis, Inc. v. Cepheid*, 5:10-CV-02840-LHK, 2012 U.S. Dist. LEXIS 100530,
 2 *2-4, 12-13 (N.D. Cal.) (granting in part motion to exclude filed in connection with summary
 3 judgment opposition).

4 Should the Court find any relief appropriate, Defendants respectfully suggest that the
 5 Court adopt Plaintiffs' first alternative remedy: a 22-page extension for Plaintiffs to file a
 6 combined response to the *Daubert* motion and class certification reply on the current schedule,
 7 with no further briefing. If the Court prefers, Defendants will re-file a consolidated class
 8 certification opposition and *Daubert* motion, and would request 40 pages to do so.² Any other
 9 relief is unwarranted and would be highly prejudicial to Defendants.

10 **B. The Court Should Fully Consider The Arguments Set Forth in Defendants'**
 11 ***Daubert* Motion in Deciding Class Certification**

12 First, under any circumstances, the Court must rule on defendants' *Daubert*
 13 challenge - which is asserted in their opposition memorandum as well as in the separate *Daubert*
 14 motion - and may and should consider the *Daubert* brief in doing so. *See Miranda v. Southern*
 15 *Pac. Transp.*, 710 F.2d 516, 521 n.2 (9th Cir. 1983) (district courts have discretion to excuse
 16 local rule violations). Defendants' 22-page *Daubert* motion contains concise arguments based
 17 on Leamer's 77-page report and 474-page deposition. Moreover, Plaintiffs are not prejudiced.
 18 Defendants have offered to extend Plaintiffs' time to respond to the *Daubert* motion (*see* Hinman
 19 Decl., ¶ 2) or, alternatively, agree to their alternative briefing proposal. *See In re Online DVD*
 20 *Rental Antitrust Litig.*, No. 4:2009-MD-02029-PJH, 2011 U.S. Dist. LEXIS 150312, *82 (N.D.
 21 Cal.) (allowing separate evidentiary objections because opposing party "has not been unduly
 22 prejudiced by the filing of the motions, and has taken the opportunity to respond"). Plaintiffs'
 23 claim that the *Daubert* motion "in theory" would require a "new and separate declaration" from
 24 Leamer is unfounded. Mot. at 3. His Report and sworn testimony about it stand or fall on their
 25 merits; he does not get a second try, regardless of the form of objection to his testimony.

26 Second, Defendants have raised serious questions about Leamer's opinions' lack of

27 ² If directed, Defendants will move for leave to file the *Daubert* motion or, alternatively, a 40-
 28 page opposition brief containing the *Daubert* arguments.

1 reliability and “fit” with the relevant facts. *See Daubert*, 509 U.S. at 591. Plaintiffs’ request to
 2 disregard the *Daubert* motion because of the form in which the evidentiary objection is made
 3 would vitiate Defendants’ right under *Daubert*, *Dukes*, and *Ellis* to have those questions resolved
 4 based on a complete exposition of the issues, in a way that informs the Court’s “gatekeeping”
 5 duties. *See also* Fed. R. Civ. P. 83(a)(2) (“A local rule imposing a requirement of form must not
 6 be enforced in a way that causes a party to lose any right because of a nonwillful failure to
 7 comply.”).

8 Third, unlike the cases Plaintiffs cite (Mot. at 2), these are not boilerplate evidentiary
 9 objections.³ The *Daubert* motion explains that Leamer’s opinions suffer from pervasive
 10 methodological flaws and analytical gaps, and applies extensive authority from the Supreme
 11 Court, Ninth Circuit, this District, and other courts. Those significant legal issues are worthy of
 12 complete briefing. It is telling that Plaintiffs wish to avoid that.

13 Fourth, Plaintiffs’ other complaints are inconsequential. They argue against themselves
 14 that the *Daubert* motion has the wrong caption because Leamer’s Report is not “a pleading.”
 15 Mot. at 3. Under Plaintiffs’ semantics, Rule 7-3(a), which applies only to “evidentiary and
 16 procedural objections to the motion,” does not apply because the Leamer Report certainly is not
 17 a “motion.” *See also Ralston*, 2011 U.S. Dist. LEXIS 138149 at n. 53 (*Ellis* held “the *Daubert*
 18 standard [w]as ‘correctly applied’ to a party’s motion to strike expert testimony at class
 19 certification”); *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 291, 315 (N.D. Cal. 2010) (striking
 20 declarations). In any event, Defendants take no issue with Plaintiffs’ contention that “a Court
 21 should disregard inadmissible evidence, not strike it from the record.” Mot. at 3 (citation
 22

23 ³ Plaintiffs’ cases involve repetitive, form objections such as lack of personal knowledge and
 24 foundation, “inconsistent with prior statements,” hearsay, best evidence, and “waste of time”; or
 25 to a failure to disclose witnesses under Rule 26(a)(1)(A). *See Villa*, 2012 U.S. Dist. LEXIS
 26 162922, *2, n.1; *Adams v. Kraft*, 828 F. Supp. 2d 1090, 1100 (N.D. Cal. 2011); *Johnson v.*
 27 *Lockheed Martin Corp.*, No. 5:11-CV-01140-LHK, 2012 U.S. Dist. LEXIS 99187, *9-10 (N.D.
 28 Cal.); *Yates v. Delano Partners, LLC*, No. 4:10-CV-03073-CW, 2012 U.S. Dist. LEXIS 149708,
 *4-5 n.2 (N.D. Cal.); *Gauntlett v. Ill. Union Ins. Co.*, No. 5:11-CV-00455-EJD, 2012 U.S. Dist.
 LEXIS 131086, *30 n.4 (N.D. Cal.); *Oak Point Partners, Inc. v. Lessing*, No. 5:11-CV-03328-
 LHK, 2012 U.S. Dist. LEXIS 133407, *3 n.2 (N.D. Cal.). Examples of the objections at issue in
 each case are Exhibits A-E to the Hinman Declaration. *See id.*, ¶ 4.

omitted); *cf. Miller v. Transamerican Press*, 709 F.2d 524, 527 (9th Cir. 1983) (“‘nomenclature is not controlling.’ The court will construe [Rule 59(e) motion], however styled, to be the type proper for the relief requested.”) (citation omitted); *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir. 1984) (“The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril.”).

C. Defendants’ Brief Uses 12-point Proportional Font As L.R. 3-4(c)(2) Requires

Finally, Defendants’ opposition brief complies with the local rules regarding typeface. The brief uses 12-point, proportionally spaced Garamond font. Local Rule 3-4(c)(2) allows proportionally spaced standard font “e.g., Times New Roman”. Thus, Times New Roman is expressly *an example* of an allowable font. If *only* Times New Roman were permitted, the rule easily could, and Defendants believe would, say that.⁴ Plaintiffs cite no authority for their argument, and Defendants are aware of none. Defendants did not violate the rule and, contrary to Plaintiffs’ suggestion, certainly had no “purpose” (Mot. at 5) to evade it. *See* Hinman Decl., ¶ 3. If the Court prefers, Defendants will re-file a substantively identical 25-page opposition in Times New Roman font.

III. CONCLUSION

Leamer’s opinions in support of Plaintiffs’ extraordinary class certification request raise, by his own admissions, serious reliability and relevance questions. The *Daubert* motion should be decided on its merits, not brushed aside based on its form. If the Court finds that any relief is required, Plaintiffs should be allowed a page extension to file one final brief on December 10.

⁴ *See, e.g., Sup. Ct. R. 33.1(b)* (“The text of every booklet-format document, including any appendix thereto, shall be typeset in Century family (e.g., Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines.”); Conn. Prac. Book §§ 66–3 (“Only the following two typefaces, of 12 point or larger size, are approved for use in motions: arial and univers”); Fl. R. App. P. 9.210(a)(2) (“briefs shall be filed in either Times New Roman 14-point font or Courier New 12-point font”).

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1 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
2 the filing of this document has been obtained from all signatories.

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